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Richard Musenyesa v. INDO Zambia Bank Limited Appeal No. 214/2016 (2020)

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Facts

In *Richard Musenyesa v. Indo Zambia Bank Limited,*[2] the Supreme Court dealt with an employee whose conditions of service were altered by their employer. The entitlement to gratuity at the end of the employment relationship was not mentioned in the new conditions of employment despite being in the previous conditions that regulated his employment.

Holding

The Supreme Court provided that where acquiescence is intended to be assumed from conduct, credible evidence will have to be led, showing that the employee was by clear notice given by the employer indeed aware of the variation, understood the implications and its full extent, before it can be said that they acquiesced or consented by conduct.

Significance

In *Pickard v. Sears,*[3] the court outlined the law on the principle of acquiescence as follows:

> Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.

The implication from the above *Pickard* holding is that a party can acquiesce to a change if they act in such a way to induce the repudiating party that they approve the change. Therefore, if an employee continues to work, even if she protests, she will be, in certain circumstances deemed in law to have accepted the new terms and conditions of employment. This is especially so, where a reasonable period of since the repudiation has passed and the party does nothing to demonstrate their dissatisfaction.

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[2] SCZ Appeal No. 214/2016.
[3] (1848) 2 Ex. 654.

The Supreme Court has over the last decade provided different positions on the principle of acquiescence and oscillated on the manner in which employees can accept a variation by their conduct. The *Richard Musenyesa* case is critical because it clarified and provides the manner in which an employee will be deemed to have accepted or rejected an adverse unilateral variation.

In a trilogy of cases, prior to *Richard Musenyesa,* namely, *Zambia National Commercial Bank v. Misheck Chanda,*[4] *Zambian Breweries Plc v. Stanley K Musa,*[5] and *Charles Nyambe & 82 Others v. Buks Haulage,*[6] the Supreme Court was emphatic that when an employee does not complain about a variation, they accepted it by acquiescence or conduct and therefore abandoned the rights held prior to the change. The above cases seem to suggest that if the employee demonstrates that they protested but continued working, they would succeed with a claim for unilateral breach of contract. The approach of the Supreme Court in these cases is in line with the English case of *Wess v. Science Museum Group,*[7] where it was held that if after the unilateral variation, the employee stays on with the employer for some time, continues with the employment without protest, they may be deemed to have impliedly accepted the variation by acquiescence.

Although the Supreme Court in *Charles Nyambe* deviated from the approach in that case, the Supreme Court again oscillated in its position on affirmation or rejection of a repudiatory breach once again in *Charles Mushitu (sued in his capacity as Secretary General of Zambia Red Cross Society) v. Christabel M. Kaumba,*[8] and *Engen Petroleum Zambia Limited v. Willis Muhanga and Jeremy Lumba*.[9]

In *Charles Mushitu (sued in his capacity as Secretary General of Zambia Red Cross Society) v. Christabel M. Kaumba,*[10] an employee worked under a project that terminated and was then placed on unpaid leave for almost nine (9) months when she was appointed to another post in another town. The Supreme Court provided that placing the employee on forced,

[4] SCZ Judgment Appeal No. 9 of 2002104/2014.
[5] SCZ Appeal No. 164/2014
[6] SCZ Appeal No. 202/2014.
[7] (1969) 1 All ER 471.
[8] SCZ Appeal No. 122/2015
(S.C.)
[9] SCZ Appeal No. 117/2016.
[10] SCZ Appeal No. 122/2015
(S.C.)

unpaid leave was an adverse unilateral alteration of the contract. In relation to acquiescence, The Supreme Court per Malila JS provided that:

> Waiver of that breach or acquiescence could only legally hold if the respondent had done or taken any action in the nature of performing her obligations as an employee post that breach.

The Supreme Court thus endorsed the view that acceptance by conduct can only occur if there is positive conduct indicating the employee consented to the repudiation. In this case notwithstanding the fact that the employee continued on unpaid leave without resigning and then accepted a new position, the court held that this was not enough to evince acceptance of the repudiation or waiver of the employer's breach. This was a material move away from the earlier Supreme Court decisions in *Misheck Chanda*, *Stanley K Musa* and *Charles Nyambe*. The court thus provided that she could claim damages because there was no evidence that she elected to accept or adopt the unilateral change.

The *Engen Petroleum* case provided that where the contract was altered, the fact that the party altering the contract, thus repudiating the contract does not bother to address the concerns of the innocent party shows that the innocent party did not acquiesce or consent to the revised contract. The *Engen Petroleum* case thereby confirmed that even where an innocent party does not raise a grievance, they cannot be automatically deemed to have not affirmed. Like in *Christabel M. Kaumba*, there must be much more lucid evidence to illustrate that the employee elected to accept the breach. This is so even though the innocent party in that case, as well as the *Nachizi Phiri* and *Christabel M. Kaumba* cases continued to work and serve under the revised conditions.

What the above holding from the Supreme Court underscores is that an innocent party will not be deemed to have elected to have affirmed a repudiation if they had knowledge of the facts as well as their right to choose between accepting and rejecting the repudiation. Only where this is proven, the innocent party will be deemed to have affirmed the contract by their conduct i.e. acquiescence.

The *Richard Musenyesa* Supreme Court judgment seems to have settled the position as it relates to acquiescence in Zambian law. Therefore, not protesting is not sufficient to evince

consent, if nothing more is done, as held in *Stanley K Musa* and *Charles Nyambe* even under Zambian employment law. The *Richard Musenyesa* case provides that where clear notice is given of the repudiation and the innocent party is aware and understands the full extent, only then can affirmation of the repudiation or acquiescence be deemed to have occurred. The *Nachizi Phiri, Christabel M. Kaumba* and *Engen Petroleum* trilogy of cases are clear that the conduct of an employee in such circumstances must be such that it induces a reasonable person to believe that the other party intends to remain bound following a variation to the contract.

The position in these cases seems to accord with the principles from the common law, which provides that mere inactivity after breach by another party does not amount to affirmation. In *Yukong Line Limited of Korea v. Rendberg Investment Corporation of Liberia*,[11] the court provided that:

> …the law does not require an injured party to snatch at a repudiation and he does not automatically lose his right to treat the contract as discharged merely by calling on the other to reconsider his position and recognise his obligation.

What the above indicates is that where an innocent party to a contract raises a grievance or calls on the party repudiating the contract to change their position, this indicates that they have not affirmed the contract. As such the recent Supreme Court decision in *Richard Musenyesa* which endorsed the *Nachizi Phiri, Christabel M. Kaumba* and *Engen Petroleum* decisions has brought Zambian law somewhat in line with common law principles.

The Supreme Court in its holding was in effect stating that the employee's silence amounted to withholding of consent with the effect that the employee accepted the repudiation. This is justified, even under contract law, where the position is that whilst silence on its own may, in appropriate cases, signify acquiescence to the variation, it can never signify an acceptance of repudiation. Nourse LJ sums up this view when he posits that:

> A choice, however resolute, which gains no expression outside the bosom of the chooser cannot be clear and unequivocal in the sense that the law requires. Silence

[11] (1996) 2 Lloyd's Rep. 604

> and inaction, being in the general cases equally consistent with an affirmation of the contract, cannot constitute acceptance of a repudiation.[12]

For all these reasons, it is clear that the Supreme Court's holding in *Richard Musenyesa* on the issue of whether the employee had affirmed the repudiation and consented to the alteration of his contract, is in line with the law of contract. The law as it stands in Zambia on a protesting employee who continues to work, is as provided in the *Engen Petroleum* and *Richard Musenyesa* cases, is that even if they continue to work after protesting, the employee will not be deemed to have acquiesced. *Richard Musenyesa* provides that if an employee can properly demonstrate the they protested the unilateral changes to their employment terms and conditions and continued to work, they will not be deemed to have acquiesced to the terms and can challenge the change and claim redundancy or early retirement for unilateral variation. It is submitted that this is not in line with the law on acquiescence as illustrated above.

As mentioned above, employment contracts are like any other contract, but with statutory interventions. Apart from statutory interventions, developments in jurisprudence also alter the rules that apply in employment law. The Supreme Court has thus made it more difficult for employers to imply consent to unilateral variations of the contract. The justification as provided in the *Attorney General v. Nachizi Phiri and 10 Others*,[13] and *Engen Petroleum* cases is to protect employees who should have their legitimate expectation to what they agreed to, safeguarded.

The justification for the deviation from established contractual principles in this area of employment is important because it shows the inclination to protect employees who have weak bargaining power in the employment relationship. If the ordinary principles of contract were to apply, most employees in Zambia would arguably be at the whim of their employers who would make changes to their detriment, without any protection for the employee.

Acceptance by conduct according to the Supreme Court in *Richard Musenyesa* is only the case where the innocent party does nothing to illustrate their rejection of the variation. In such a situation, acquiescence cannot be said to occur as the innocent party cannot be said to

[12] Vitol SA v. Norelf Limited (The Santa Clara) [1996] A.C. 800
[13] SCZ Appeal No. 68/2009.

have induced the repudiating party to believe that they have accepted the different state of affairs created by the repudiation. In *Khatri v. Cooperative Centrale Raiffeisen-Boerenleenbank BA*, an employee refused to consent to a variation by not signing the variation letter and continued to work. The court held that the fact that he continued to work did not automatically mean he accepted the unilateral and adverse changes.

It would have been helpful for the recent *Richard Musenyesa* case to address the legal principles pronounced upon in *Misheck Chanda*, *Stanley K Musa* and *Charles Nyambe* which provided that an employee needs to demonstrate that they protested to justify an assent to a unilateral variation. It is clear that these cases, especially in the employment law context are not completely accurate. However even without mentioning those cases, it is clear *Richard Musenyesa* is now the legal position in this area of law. In *Davies Jokie Kasote v. The People*[14] the Supreme Court held:

> A lower court is not entitled to say simply because the Supreme Court in a judgment has not mentioned an earlier decision of the same Court that the earlier decision was overlooked and that the later decision was therefore given *per incuriam*.

Therefore, it follows that on the strength of the decision in *Kasote*, a later Supreme Court judgment, where the facts and circumstances are similar to a previous judgment on the matter, the later judgment should prevail over the earlier decision, even though in the later case the court did not refer to the previous decision. Therefore, for now, the *Richard Musenyesa* is the law of Zambia on acquiescence of unilateral alterations of the contract that are disadvantageous and have not been consented to.

The Supreme Court's approach in *Richard Musenyesa* case is both justifiable and helpful in protecting employees. The Supreme Court endorsed the principle that even where an innocent party accepts performance of the repudiating party after becoming aware of the breach and does not expressly protest, this is not automatically acquiescence. The law of contract goes beyond. Although common law dictates that an innocent party affirms a contract after an innocent party fails to terminate after a reasonable time, the law of contract also provides that

[14] (1977) Z.R. 75 (S.C.).

where an innocent party's conduct does not show approval, they can successfully claim that they did not acquiesce.

This is especially so in the employment context. In *Rigby v. Ferodo Limited,*[15] the court was resolute that an employee can only claim damages for a unilateral variation if they make it clear that they are not prepared to accept the unilateral variation and have done nothing subsequently to evince any consent to the unilateral change imposed. The court per Lord Oliver held:

> …I know of no principle of law that any breach which the innocent party is entitled to treat as repudiatory of the other party's obligations brings the contract to an end automatically.

What the above statements infer is that when a party breaches a contract, the contract does not automatically terminate. The reasoning in the *Rigby* case above has been confirmed by the Supreme Court in *Nitrogen Chemicals of Zambia Limited v. Boyd Chomba Mutambo and Others*[16] where the Supreme Court was of the view that if there is evidence that employees did not accept a unilateral variation, they will not be bound a contract that has been unilaterally altered to their detriment. The *Nitrogen Chemicals* case accords with the recent approach taken in *Richard Musenyesa* that there must be evidence that an employee being fully aware of the variation, understood the implications and its full extent and choose to accept the situation.

Thus, whereas it would seem that the approach in the recent *Richard Museyensa* case does not accord with contractual law principles in relation to acceptance by conduct, the analysis above illustrates that this is not necessarily the case. The law of contract differentiates between acceptance by silence and by conduct. Where an innocent party and their subsequent conduct indicates that they did not accept the repudiation, the court, especially in employment cases, will protect the party and uphold the contract. Above all, it is clear that the Supreme Court is now more inclined to protect the sanctity of contract, especially in employment cases where employees are in a weaker position to express their views on changes that affect the employment relationship.

[15] (1988) ICR 29, House of Lords
[16] SCZ Appeal No. 75/2014.

Lastly, it is also worth considering the holding in the case of *Zambia Daily Mail Limited v. Grevesious Muyenga and Others.*[17] In that case, the Board of Directors of the employer amended the retirement benefits for management employees by reducing the entitlement from six months basic pay, to three months basic pay for each year worked. The employees continued working for a short period until they retired. The Supreme Court provided that:

> …where the variation of the conditions of service has of no immediate practical effect, as in the present case, there can be no implied consent, for mere failure to object.

According to the court in *Grevesious Muyenga* where the variation relates to a matter which has immediate practical application (e.g. the rate of pay) and the employee continues to work without objection after effect has been given to the variation then obviously they may well be taken to have impliedly consented, but if it does not have immediate practical application such as a retirement or terminal benefit and the employee does not protest or resign, more evidence is required to indicate they consented.

The position in *Grevesious Muyenga* is attractive because it provides another benchmark for measuring acquiescence and acceptance of a unilateral, adverse variation by conduct. Where the variation will take effect immediately, such as forced unpaid leave like in *Christabel M. Kaumba*, implicit agreement can only be inferred if the conduct of the employee indicates that they do not object to the change. However where the practical application of the unilateral variation is not immediate, more credible evidence as provided in *Richard Musenyesa* is required. It is submitted that this approach is necessary to protect the legitimate expectations and welfare of employees under the contract of employment they entered into.

In essence, the practical application test recognises the stronger bargaining power of employers and protects employees from receiving less benefits under the contract due to a variation that they did not consent, or intend to be bound to. For these reasons, the extensive test for acquiescence developed from *Nachizi Phiri*, *Christabel M. Kaumba*, *Engen Petroleum* and *Richard Musenyesa* is attractive in mitigating against unilateral variations that

[17] SCZ Appeal No. 31/2010

an employee could or would never have agreed to. The previous tests of not protesting indicating consent by conduct would have put Zambian employees at the whim of their employer.

Now, by virtue of *Richard Musenyesa,* employees do not have to resign and risk losing their livelihoods or be victimised for protesting, but must produce evidence that they did not consent. Therefore even if they continue in employment or don't protest, if there is evidence they did not agree or would not have agreed to a change to their detriment, the courts will hold that their previous, unaltered contract will govern their relationship with the employer rather than the adversely, unilaterally altered contract.